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NO. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE SUN PUBLISHING COMPANY, INC.,
petitioner,

versus

JAMES JONES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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QUESTION PRESENTED FOR REVIEW

Did the judgment rendered by the Supreme Court of South Carolina in this libel action impose liability without proof of fault upon Petitioner newspaper publisher in violation of its First and Fourteenth Amendment constitutional rights in respect to freedom of speech and of the press (1) by reversing the Trial Court's judgment *non obstante verdicto* in Petitioner's favor validly granted for lack of proof of fault on its part as a matter of law, and (2) by reinstating without review the flawed and invalid verdict which had been returned against it under erroneous jury instructions, duly excepted to, as to libel *per se* and presumed malice, thereby casting the burden of overcoming such presumption on Petitioner, and subjecting Petitioner to a finding of liability without proof of fault on its part?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Petitioner, The Sun Publishing Company, Inc.[1] respectfully prays that a Writ of Certiorari be issued to review the Judgment and Opinion of the Supreme Court of the State of South Carolina entered in this proceeding on March 30, 1982.

OPINION BELOW

The Opinion of the Supreme Court of the State of South Carolina, Opinion No. 21680, filed March 30, 1982, is reported in .....S. C. ....., 292 S. E. 2d 23 (1982). Copy is attached as Appendix A. The Order of the Supreme Court of South Carolina filed May 31, 1982, which denied Petitioner's Petition for Rehearing is attached as Appendix B.

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[1] The Petitioner, The Sun Publishing Company, Inc. is a wholly owned subsidiary of The State-Record Company, a Delaware Corporation. Other wholly owned subsidiaries of The State-Record Company, Inc., are Columbia Newspapers, Inc.; The State Printing Company, Inc.; Gulf Publishing Company, Inc.; State Telecasting Company, Inc. (S.C.); State Telecasting Company (Delaware); Newberry Publishing Company and; Band & White, Inc.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3). The judgment of the Supreme Court of the State of South Carolina, dated March 30, 1982, violates the rights of Petitioner granted by the First and Fourteenth Amendments to the Constitution of the United States in respect to freedom of speech and of the press. Petitioner's petition for rehearing was denied by Order dated and entered May 31, 1982. This petition for a writ of certiorari was filed within ninety (90) days of that date.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Amendment I:

"Congress shall make no law . . . abridging the freedom of speech or of the press . . . "

Amendment XIV:

" . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

This action in libel was instituted by Respondent on May 4, 1976, seeking to recover $1,000,000.00 damages, actual and punitive, by reason of a news article which appeared in the January 27, 1976, issue of The Sun News, a daily newspaper published by Petitioner in Myrtle Beach, South Carolina. (R. 1-4)

In the summer of 1975 the FBI conducted an investigation along the east coast into pirated tapes of copyrighted music. In June, 1975, more than 35,000 tapes suspected of being "pirated" were confiscated at Myrtle Beach, South Carolina, together with equipment suspected of being used to produce illegal tapes from legal, copyrighted tapes. The seizure was reported in the June 20, 1975, issue of The

Sun News, a daily newspaper published by Petitioner in Myrtle Beach, without the mention of names. (R. 122)

On November 21, 1975, The Sun News reported the arraignment of five Myrtle Beach men and a Charlotte, North Carolina, man on an information which charged that they "aided and abetted each other in connection with the wilful infringement of copyrighted eight-track tapes," according to the U. S. Attorney's office in Columbia. Assistant U. S. Attorney Reynolds Williams was quoted as saying that Herman Jones, Jack Jones, James Jones, Michael E. Schitano, and Randall Small, all of Myrtle Beach, and Buck Baker, of Charlotte, North Carolina, pleaded innocent to the seven-count information. (R. 124)

On Tuesday, January 27, 1976, an article in The Sun News stated that on the previous day Herman Calvin Jones, James Jones, Randall Small, and Michael E. Sichitano pleaded guilty in the Federal Court at Florence and were fined on misdemeanor charges arising from the violation of a copyright on a stereo recording, according to the U. S. Attorney's Office in Columbia. (R. 116) This statement was attributed to the United States Attorney but was actually made by Assistant U.S. Attorney Reynolds Williams to Petitioner's reporter John Monk on a long distance call to Williams in Columbia. (R. 50, 75)

This article, which is the one in question, was written by Petitioner's reporter John Monk based upon information obtained by him from the United States Attorney's office by means of a long distance telephone call from Myrtle Beach to Columbia, South Carolina, a distance of approximately 141 miles. (R. 47-52; 48)

It was not until the service of the suit papers in the instant action that Petitioner and reporter Monk learned that there had been a mistake in the information on the basis of which the article of January 27, 1976, had been written. (R. 39)

In the article the list of those reported as having pleaded guilty included the name of Respondent, James Jones, instead of that of his co-defendant uncle, Jack Jones, who, with co-defendant Herman Jones, Respondent's father, pleaded guilty and was fined. The charges against Respondent had been dismissed several days earlier by the United States Attorney as a part of his plea bargaining with co-defendants Herman and Jack Jones. (R. 72)

Petitioner's Answer admitted the publication of the article in question; alleged that it was published without malice and from information obtained through official channels concerning a matter of public interest; and that it was privileged under the provisions of the First Amendment to the Constitution of the United States and similar provisions in the South Carolina Constitution.

The action was tried during the February, 1979 term of Court before Circuit Judge Wade S. Weatherford and a jury. (R. 1) The plaintiff's case consisted solely of his testimony identifying the news article complained of and the United States Attorney's dismissal of the charges against him (R. 12, 9), and stating that he was embarrassed and upset by the article. (R. 13, 14) He stated that he was employed by his father as manager of a motel, and there was no evidence of any pecuniary damage or actual loss. (R. 8)

Petitioner's motion for a nonsuit contended, first, that Respondent had failed to prove, by clear and convincing evidence, that the newspaper had any knowledge that the article printed was false or that it acted in reckless disregard whether it was false or not; secondly, that there was no proof of any degree of fault on Petitioner's part, "no evidence that the newspaper was, in any way, at fault in printing the article or portion of the article that is complained of;" and thirdly, that there is no proof or offer of proof of malice on the part of Petitioner. (R. 15)

The motion was overruled (R. 24) and reporter Monk and Assistant United States Attorney Williams were called as witnesses by Petitioner.

Monk testified to the long distance conversation with Williams at the U. S. Attorney's office in Columbia. (R. 31, 33, 34) He said this was the customary procedure for obtaining news stories about criminal proceedings in the Federal Court. (R. 32) Williams also testified to the long distance conversation, and he said that in virtually every out of town case of any importance he would get such calls from out of town reporters. (R. 70, 71) Both Monk and Williams stated that the long distance conversation occurred on the day before the article of January 27, 1976, appeared. (R. 48, 89)

Monk identified the notes, made by him during the conversation with Williams (Defendant's Exhibit 4). (R. 35) He testified unequivocally that, as shown by his notes, the name of James Jones was among the list of names which Williams gave him. (R. 125, 35, 36)

Williams in his testimony did not take issue with what Monk testified to. (R. 76) He stated, in substance, that while he had read the names and the amounts of the fines from the file he did not have a specific recollection of what he said; (R. 76) that in previous dealings with this file he had confused in his mind the various Joneses in this case; (R. 77) and when asked specifically on cross-examination whether he "at any time, read the name, James Jones, as having pled guilty to this indictment," he replied, "I do not know." (R. 81) He said he could have made a mistake, and did not know whether he did or not. (R. 89)

Petitioner's motion for a directed verdict, which again challenged the sufficiency of the evidence as matter of law to take the issue of fault on its part to the jury, was overruled. (90, 91, 107, 108)

In his charge to the jury the Trial Judge eliminated the issue of punitive damages, stating that the proof in the case did not establish any actual or expressed malice. However, he instructed the jury that the "publication of false written words which charge another with the commission of a crime is said to be a libel, *per se*, meaning of itself;" that "any expression which is libelous, *per se*, presumes or implies the presence of malice;" and that "the law itself considers that this wrongful act carries with it an implication of intent and an implication of an absence of justification." He charged further that "the presumption of malice is a rebuttable presumption," and that "if the implied malice, having once been established, is not rebutted, or answered or overcome, then that is sufficient proof by the plaintiff to meet his burden or proof," and he "is entitled to rely upon the implied malice in meeting the burden of proving one of the essentials of his claim." (R. 133-135)

Petitioner's counsel duly excepted to this portion of the charge to the jury as being erroneous "under the *Gertz* case." (R. 141, 142, 140)

The jury returned a verdict for Respondent in the amount of $35,000.00 actual damages. (R. 113)

Petitioner made a motion for judgment *non obstante veredicto* on the ground that the evidence as a matter of law failed to show that the publication was made by the defendant with actual malice or fault in fact, and that liability under the First and Fourteenth Amendments cannot be predicated upon presumption of malice based upon the content of the article published. (R. 144-145)

Petitioner in the alternative moved for a new trail because the Court erred in charging the jury in connection with libel *per se*, and presumed or implied malice, and the burden of proof on the issue of malice, and that the charge permitted the jury to find a verdict against Petitioner "even

if it were not in fact at fault in connection with the publication of the alleged libelous statement." (R. 146, 147)

In his order dated August 20, 1979 (Appendix C) (R. 148-155), Judge Weatherford granted Petitioner's motion for judgment *non obstante veredicto* on the ground that the showing made failed to warrant or support a reasonable inference of simple negligence on the part of the publisher or the reporter. He wrote: "A directed verdict should have been granted on the question of liability. This makes it unnecessary to discuss the motion for a new trial." (R. 154)

Petitioner filed exceptions to the failure to consider the alternative motion for a new trial. (Appendix D) (R. 157-158)

On March 30, 1982, Judge Weatherford's Order was reversed in a majority opinion of three Justices of the Supreme Court of South Carolina, written by Justice Harwell. Chief Justice Lewis and Justice Littlejohn each dissented. (Appendix A)

The majority opinion held that "a jury question was presented as to whom (sic) was at fault in publishing the erroneous article," and that Judge Weatherford "was in error in substituting his view of the facts for those found by the jury." The majority opinion concluded: "We reverse and reinstate the verdict."

In reinstating the verdict the majority of the Court did not note or pay any attention to the fact that the record on the appeal showed that the validity of the verdict was challenged by Petitioner, and was flawed and invalid. It was returned by the jury pursuant to instructions, duly excepted to, as to libel *per se*, presumption of malice, and burden of proof, which authorized and permitted a verdict without finding Petitioner at fault, and placed the burden of proof on the issue of fault upon Petitioner instead of on Respondent as plaintiff. (R. 146, 147)

Petition for rehearing was denied by order dated May 31, 1982, with Chief Justice Lewis and Justice Littlejohn again dissenting. (Appendix B)

Petitioner repectfully submits that liability was imposed upon it by the Supreme Court of South Carolina without proof of fault on its part, by reversing the judgment *non obstante veredicto* in its favor, and also by reinstating the verdict which had been returned under instructions permitting the jury to find liability without finding fault on its part.

Federal Question Was Raised and Preserved

The Federal Question sought to be reviewed was first raised in Petitioner's Answer (R. 5) and thereafter raised and preserved at each subsequent opportunity: in its motion for nonsuit at the close of Respondent's evidence (R. 15-24); in its motion for directed verdict (R. 90, 105); in its exceptions to the Trial Judge's charge to the jury (R. 141-143); in its motion for judgment *non obstante veredicto* after the return of the verdict against it (R. 144-145); in its motion for a new trial in the alternative (R. 146-147); in its Exceptions, on Respondent's appeal to the Supreme Court of South Carolina, to the Trial Judge's failure to pass upon and grant Petitioner's motion for a new trial in the alternative (R. 157); and in its Petition for a Rehearing in the Supreme Court of South Carolina (Appendix E).

REASONS FOR THE WRIT

I

The Judgment of the Supreme Court of South Carolina in this libel action imposed liability without proof of fault upon Petitioner newspaper publisher in violation of its First and Fourteenth Amendment rights

by reversing the Trial Court's Judgment non obstante veredicto in Petitioner's favor validly granted for lack of proof of fault on its part as a matter of law.

(1)

Under the First Amendment, liability in a defamation action by a private individual cannot constitutionally be imposed upon a publisher or broadcaster in the absence of proof of fault by the plaintiff.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 248 (1974), the Court recognized that the First Amendment "shields the press and broadcast media from the rigors of strict liability for defamation" in actions brought by private individuals.

In the *Gertz* decision the Court announced "constitutional limitations" on the power of the States to "define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."

"These are a prohibition against imposing liability without fault, 418 U.S., at 347, and the requirement that compensatory awards 'be supported by competent evidence concerning the injury.' *Id.*, at 350." *Time, Inc. v. Firestone*, 424 U.S. 448, 458 (1976).

(2)

From a reading of the majority opinion in the instant case, it would appear that the Supreme Court of South Carolina has adopted common law negligence in the publication of a defamatory statement as the standard of liability which a private individual must prove under the First Amendment in order to recover actual damages from the publisher or broadcaster. Under The United States Constitution, however, the question whether evidence is legally sufficient to warrant submission of the issue of

Petitioner's alleged negligence or other fault to the jury is a Federal question, not of fact, but of law.

An essentially similar Federal question was presented in petitions for writs of certiorari filed by railroad defendants seeking review of judgments rendered against them in state courts under the Federal Employers Liability Act which imposed liability upon proof of negligence on their part for injuries sustained by their employees in interstate commerce.

The controlling principle in such cases was stated in *Atlantic Coast Line Railroad Co. v. Driggers*, 279 U.S. 787, 788 (1929), to be that:

> [I]f it appears from the record that under the applicable principles of law as interpreted by the Federal courts, the evidence was not sufficient in kind or amount to warrant a finding that the negligence of the railroad company was the cause of death, the judgment must be reversed.

The Court said in *Brady v. Southern Railway Co.*, 320 U.S. 476, 479 (1943):

> The weight of the evidence under the Federal Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of the facts—in this case, the jury. (citing cases) When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict. The court should determine the proceeding by nonsuit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.

The Court said in *Gunning v. Cooley*, 281 U.S. 90, 94:

> A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule "that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Schuylkill & D. Improv. & R. Co. v. Munson*, 14 Wall. 442, 448, 20 L. Ed. 867, 872; *Pleasants v. Fant*, 22 Wall. 116, 122, 22 L. Ed. 780, 783.

cf. Creswill v. Grand Lodge, K of P., 225 U.S. 246 (1912); *Union P. Railroad Co. v. Huxoll*, 245 U.S. 535 (1918).

(3)

It is respectfully submitted that the Supreme Court of South Carolina has permitted the imposition of liability on the Petitioner newspaper publisher by a verdict based on speculation without proof of negligence or fault of any kind.

(a)

The critical factual issue in the case was whether Assistant United States Attorney Williams made a mistake in the list of names that he gave to reporter Monk over the telephone or whether reporter Monk made the mistake of inserting the name of Respondent in such list in his notebook.

The list published was that which Monk had written in his reporter's notebook during the telephone conversation. Monk's clear and positive testimony was that these were the names given to him. Williams impliedly attested to

Monk's care in making the notes by his statement that he knew Monk was taking notes because Monk would confirm spellings with him and would repeat things he had said.

Williams did not controvert in his testimony the testimony of Monk. Instead he stated that his recollection was not specific enough that he could deny what Monk had said. Although Williams said he read the names and the amounts of the fines from the file, he again testified that he had no specific recollection of what he had said. He admitted that in his previous dealings with this file he had confused in his own mind the various Joneses in this case. When asked on cross-examination whether, at any time, he had "read the name James Jones as having pled guilty to this indictment," he replied "I do not know." His final testimony was that he could have made a mistake in his conversation with Monk, and that he did not know whether he did nor not.

Chief Justice Lewis after setting out what he termed the "critical testimony" of Williams, stated in his dissenting opinion:

> *The witness says he does not know what he said.* If he testified truthfully, the jury could only conclude that he did not remember. His actual words would remain a matter of pure speculation. If his testimony was not true, and he was merely feigning forgetfulness, the jury would still have no basis for any finding as to Williams' actual statement to Monk. *Even in the exercise of reasonable conjecture, as the majority would have the jury do, the only reasonable conclusion is that it was Williams not Monk who made the mistake,* given his admission that he had confused the Joneses before.
>
> The majority insists, however, that this testimony (which stands utterly alone) requires submission of

the case to the jury and sustains a verdict upon the premise that Monk improperly recorded the names. *The testimony evidences nothing of the kind; in fact, it is evidence of nothing at all.*

Certainly, the testimony of Williams, that he did not remember what he told Monk, would have no probative value in establishing what he did tell Monk. Likewise, it could have no probative value in refuting the statement of Monk as to what Williams did say. (Emphasis added)

Chief Justice Lewis wrote further that although South Carolina adheres to the "scintilla of evidence" rule, "this is the first time in my experience in which the Court has erected a jury issue upon testimony from which no material inference can be drawn."

The majority's reasoning on this issue was as follows:

Although the attorney testified that he had confused the various Joneses in his own mind on a previous unrelated occasion, he stated the records were in front of him when he spoke to the reporter on the telephone. Moreover, he testified that he did not have a 'specific recollection' of what he said to the reporter.

It is undisputed appellant's name did not appear on the public record as having pled guilty. Since the U. S. Attorney could not recall what he conveyed to Monk, the defendant's reporter, over the telephone, but testified that he read the names directly from the record, a jury issue was created as to whether the U. S. Attorney erred in reading the names to Monk or whether the reporter erred in writing them down. The testimony supports the jury's apparent finding that Williams, the U. S. Attorney, read the correct names to Monk but that Monk erred in writing them down.

Petitioner submits that the foregoing statement fully justified Chief Justice Lewis' characterization of it, that "the Court has erected a jury issue upon testimony from which no material inference can be drawn."

To the extent that the word "directly" may have had importance in the majority's conclusion, it should be noted that it was a word not used by Williams in his testimony. The majority overlooks entirely the significant circumstance that Williams was reading the names from five names while Monk was writing from none except those given him over the telephone. And the majority's stated conclusion gives effect to supposed speculation by the jury on what Williams did and said despite the fact that Williams, a participant in the action involved, would not himself speculate on it under oath.

When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to support neither. *Gunning v. Cooley, supra,* at 94 of 281 U.S.

The record leaves the matter of what Williams may have done and said in the realm of speculation and doubt at best, and that is not enough. *Chicago, M. & St. P. R. Co. v. Coogan,* 271 U.S. 472, 478 (1926).

The testimony given by Monk stands uncontradicted; it is corroborated beyond question by the notebook entry, which is physical evidence of a contemporary and compelling nature; no reason appears in the record to doubt that the list published was in fact the list which Monk was given over the telephone; and the holding in the majority opinion that a jury issue was created as to whether the mistake may have been Monk's is completely without foundation in the record.

The majority opinion sought to shore up its reversal of the Trial Court's judgment by the following speculative reasoning:

> Moreover, the jury could have inferred that Monk departed from acceptable standards of reporting when he failed to check the public record himself, rather than relying on information supplied over the telephone. Williams testified the records were open to the public and that Monk could have read them himself. Additionally, the six day hiatus between the guilty pleas and the publication of the defamatory article negates any rush by respondent to print 'hot news.' The jury could have reasonably concluded that Monk's failure to make an independent investigation, either by checking the public records himself or contacting the Joneses, with whom he was acquainted, was negligence.

The majority's statement about a "six day hiatus" was an unfortunate one, for the record clearly shows that the guilty pleas were entered on January 26th and the article appeared in the January 27th issue of The Sun News

Respondent offered no evidence to show what the majority opinion called "acceptable standards of reporting." Petitioner's evidence showed that Monk was an experienced reporter and that the Assistant United States Attorney was the usual spokesman for the United States Attorney's office. The evidence in the record bearing upon reporting procedures or standards came from Monk and Williams. The testimony of both showed that Monk's telephone inquiry of the United States Attorney's office was in keeping with the customary procedure by which out of town newspapers and their reporters obtained information about criminal proceedings in the Federal Courts. There was no evidence to the contrary.

The majority holding speculated that the jury "could have" found negligent departure from "acceptable standards of reporting" with no basis for such finding except their lay and uninformed inferences about a professional

matter. In Restatement (Second) of Torts, § 580B, Comment g, 227-228 (1976) it is suggested, in substance, that such a finding would unavoidably amount to a finding that the defendant must have been negligent because the publication was false, and thus would constitute a form of strict liability *de facto* circumventing the constitutional requirement of proof of fault.

On this issue the Trial Judge's holding which the majority opinion reversed was as follows:

> There is no evidence in the record that the reporter acted in any way other than as a reasonably prudent reporter would have acted under similar circumstances. The information for the story was obtained from a public official in the course of his official duties. The source had proved reliable in the past and there was no reason to doubt the accuracy of the information released by him on this occasion. The information relating to this criminal proceeding was sought and obtained in the same manner that had been routinely utilized by this reporter and other members of the news media in general practice.

Petitioner submits that the Trial Judge's holding was warranted and supported by the record, and that the judgment reversing it and substituting a speculative possible finding of fact on Petitioner's part contravened its constitutional rights.

(c)

It is respectfully submitted that the judgment *non obstante veredicto* granted by the Trial Judge because a verdict should have been directed for lack of proof of fault was warranted and required by the evidence as a matter of law, and that the judgment of the Supreme Court of South Carolina erroneously reversing the judg-

ment of the Trial Court imposed liability without fault upon Petitioner in violation of its constitutional rights.

II

The judgment of the Supreme Court of South Carolina in this libel action imposed liability without proof of fault upon Petitioner newspaper publisher in violation of its First and Fourteenth Amendment rights by reinstating the flawed and invalid verdict which had been returned against it under erroneous jury instructions, duly excepted to, as to libel per se and presumed malice which cast the burden of overcoming such presumption on Petitioner and permitted the finding of liability without proof of fault on its part.

The Trial Judge instructed the jury as follows:

> The publication of false written words which charge another with the commission of a crime is said to be a libel, *per se*, presumes or implies the presence of malice. . . . Now, ladies and gentlemen, the presumption of malice is a rebuttable presumption and so if you find, from the proof in the case, at one point you say malice is present, implied malice has been established. Then you must consider whether or not it has been answered and overcome. . . . But now if the implied malice, having once been established, is not rebutted or answered or overcome, then that is sufficient proof by the plaintiff to meet his burden of proof. In other words, he is entitled to rely upon the implied malice in meeting the burden of proving one of the essentials of his claim.

These instructions were duly excepted to "under the *Gertz* case" by counsel for Petitioner at the conclusion of the charge but were adhered to by the Trial Judge. The verdict reinstated by the Supreme Court of South Carolina

in the majority opinion was returned by the trial jury under these erroneous instructions.

After the return of the verdict, counsel for Petitioner moved for judgment *non obstante veredicto* in its favor, and also for a new trial in the alternative upon grounds, among others, that the foregoing instructions were erroneous under the First and Fourteenth Amendments.

The Trial Judge granted judgment *non obstante veredicto* in Petitioner's favor, but did not discuss or pass upon the alternative motion for a new trial. Petitioner, in accordance with South Carolina practice, filed in Respondent's appeal record exceptions to this failure of the Trial Judge to pass upon the alternative motion, thereby preserving its challenge to the verdict based upon the strict liability charged to the jury under which the verdict was returned.

The majority opinion reinstated the verdict without passing upon Petitioner's exception to the Trial Judge's failure to grant a new trial in the alternative, and consequently without remanding the case for consideration by the Trial Court of Petitioner's duly preserved challenge to the instructions under which the verdict was returned.

Since the Trial Court's instruction authorized the jury to return a verdict upon the basis of the presumption of malice contained in the instructions, and did not require the jury to find any fault in fact on the part of Petitioner or its reporter, it is respectfully submitted that the instructions were erroneous under *Gertz v. Welch, supra*, and that the verdict returned against Petitioner was thereby flawed and invalid, and should have been set aside. To the judgment of the Supreme Court of South Carolina his reinstating such verdict imposed liability upon Petitioner without proof or finding of fault upon its part, and thereby violated its rights under the First and Fourteenth Amendments.

CONCLUSION

It is respectfully submitted that the question presented for review is meritorious; that such question is of general importance in the Federal Constitutional law applying to libel actions brought against publishers and broadcasters by private individuals, as well as to Petitioner and others engaged in carrying on news media business in South Carolina; and that due consideration of the proof in this case under the legal principles applicable under the First Amendment will warrant the reversal of the challenged judgment.

For the reasons hereinabove set forth, it is respectfully prayed that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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